

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	NOTICE OF CORRECTION
RIGHT NO. G-129039-76D BY DEAN B.)	
KEIM AND MIKE B. KRUEGER)	

* * * * *

Please be notified of the following error in the Final Order dated June 27, 1990 in the above-entitled matter. This will serve as your only notification. You are advised to attach this document to your copy of the Final Order to complete your record.

The land description of the changed point of diversion is incorrect on page 1 and 3 of the Final Order and should read as follows:¹

... to change the point of diversion for Water Right No. 129039-s76D from the SE~~1~~NE~~1~~SE~~1~~ of Section 15 to SW~~1~~NW~~1~~SW~~1~~ of Section 14, Township 37 North, Range 28 West.

Attached for reference is a copy of the original Application for Change of Appropriation Water Right. This will verify that the above information is correct.

¹The corrected land description in underlined.


FILMED

SFP 10 1991

BY _____

CASE # 129039

Dated this 7 day of September, 1990.


Laurence Siroky
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resource Division
1520 East 6th Avenue
Helena, MT 59601
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Correction was duly served upon all parties of record at their address or addresses this 10th day of September, 1990 as follows:

Dean B. Keim and
Mike B. Krueger
4155 West Kootenai Road
Rexford, MT 59930

Charles Sprinkle and
Douglas Sprinkle
P.O. Box 795
Libby, MT 59923

Douglas F. and Stella Truman
2655 West Kootenai Road
Rexford, MT 59930

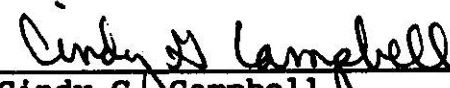
Larry Beardsley
3500 W. Kootenai Road
Rexford, MT 59930

Lawrence H. Sverdrup
503 California Ave.
Libby, MT 59923

Judith Watson
440 West Kootenai Road
Rexford, MT 59930

John A. Miller
251 Whitetail Drive
Rexford, MT 59930

Chuck Brasen, Field Mgr.
Kalispell Water Resources
Field Office
P.O. Box 860
Kalispell, MT 59903


Cindy G. Campbell
Hearings Unit Secretary

Form No. 606 R7-86

APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT

INSTRUCTIONS

Use this form to apply for authorization to change the point of diversion, place of use, purpose of use, or place of storage of your water right. Attach a map as instructed under Item 6. In addition you must complete the appropriate application supplement to substantiate that the criteria for issuance of an authorization is met according to 85-2-402 MCA. Failure to supply a map or application supplement constitutes an incomplete application and the application will be returned. The completed application should be submitted with the proper filing fee to the appropriate Water Rights Field Office listed on the back page.

(Please type or print in ink)

RECEIVED

DEC 10 1987

MONTANA D.N.R.C.
KALISPELL FIELD OFFICE

FOR DEPARTMENT USE ONLY

Application No. 6-129039 Basin 760
Date Received 12-10-1987
Time 1130 A.M./P.M.
Received by [Signature]
Transmittal No. 08-024-01-13
Fee Received \$ 50.00
Check No. 323
Refund 606-600

1. NAME OF APPLICANT(S) Dean B. Keim & Mike B. KRUEGER
Mailing address 4155 WEST Kootenai Road
City Rexford State MONTANA Zip 59930
Home phone 406-889-3297 Other phone _____

2. WATER RIGHT TO BE CHANGED IS: (Check the appropriate box(es). If needed, contact the Water Rights Bureau Field Office nearest you to determine the appurtenant water right you are proposing to change.)

- ☒ (W) Statement of Claim No(s). 760-D-W-129039-00
- ☐ (E) Exempt Existing Water Right (No Statement of Claim Filed — Groundwater or instream domestic or stock uses ONLY. Complete Item 7).
- ☐ (D) Powder River Decree No(s). _____
- ☐ (P) Permit to appropriate Water No(s). _____
- ☐ (C) Certificate of Water Right No(s). _____
- ☐ (M) Reservation of Water No(s). _____

ATTACH A COPY OF THE WATER RIGHT CHECKED ABOVE

3. AMOUNT OF WATER TO BE CHANGED:

Do you propose to change all ☒ or a portion ☐ of your water right? If a portion, identify what portion by flow rate and volume.

160 GPM up to 50 per year
gal./min. or cubic feet/sec. acre-feet

MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION
1520 EAST SIXTH AVENUE, HELENA, MONTANA 59620-2301 444-6610

DNRC

CASE # 129039

4. TYPE OF PROPOSED CHANGE: Complete ONLY the type of change you are proposing. Multiple changes of one right or identical changes of more than one right may be applied for on one application.

A. Change in POINT OF DIVERSION

1.) Location of proposed point of diversion

SW 1/4 NW 1/4 SW 1/4 Section 14, Township 37 N, Range 28 W, Lincoln County.

Government Lot _____, or Lot _____, Block _____, Subdivision Name _____

_____ 1/4 _____ 1/4 _____ 1/4 Section _____, Township _____ N/S, Range _____ E/W, _____ County.

Government Lot _____, or Lot _____, Block _____, Subdivision Name _____

2.) Is the new point of diversion: ☐ in addition to the old point of diversion
or ☒ replacing the old point of diversion

3.) Source of water if changed _____

4.) Means of diversion if changed Headgate & Ditch

5.) If a well is involved indicate the depth of; old well _____ ft. and new/proposed well _____ ft.

6.) New well is located approximately _____ feet _____ direction of old well.

B. Change in PLACE OF USE

1.) Describe the location where you propose to use the water right. For irrigation show the number of acres for each description. Use additional sheets if necessary.

County Lincoln Subdivision Name _____

<u>18</u> Acres, Lot _____	Block _____, <u>E 1/2 SW 1/4 NW 1/4</u> Section <u>14</u> , T <u>37 N</u> , R <u>28 W</u>
<u>2</u> Acres, Lot _____	Block _____, _____ 1/4 _____ 1/4 Section _____, T _____ N/S, R _____ E/W
<u>2</u> Acres, Lot _____	Block _____, <u>NW 1/4 SW 1/4 NW 1/4</u> Section <u>14</u> , T <u>37 N</u> , R <u>28 W</u>
<u>1</u> Acres, Lot _____	Block _____, <u>S 1/2 NW 1/4 NW 1/4</u> Section <u>14</u> , T <u>37 N</u> , R <u>28 W</u>
_____ Acres, Lot _____	Block _____, _____ 1/4 _____ 1/4 _____ 1/4 Section _____, T _____ N/S, R _____ E/W
_____ Total acres	

2.) If some acres will be taken out of irrigation, identify those acres by location which will no longer be irrigated by this water right.

<u>12</u> Acres, Lot _____	Block _____, <u>NE 1/4 SE 1/4</u> _____ 1/4 Section <u>15</u> , T <u>37 N</u> , R <u>28 E</u>
<u>3</u> Acres, Lot _____	Block _____, <u>NE 1/4 SE 1/4</u> _____ 1/4 Section <u>15</u> , T <u>37 N</u> , R <u>28 E</u>
_____ Acres, Lot _____	Block _____, _____ 1/4 _____ 1/4 _____ 1/4 Section _____, T _____ N/S, R _____ E/W
_____ Acres, Lot _____	Block _____, _____ 1/4 _____ 1/4 _____ 1/4 Section _____, T _____ N/S, R _____ E/W
_____ Total acres	

C. Change in PURPOSE OF USE

1.) Proposed Use(s):

Use _____, Rate _____ cfs, Volume _____ acre-feet
Period of Use _____ mo./day to _____ mo./day

Use _____, Rate _____ cfs, Volume _____ acre-feet
Period of Use _____ mo./day to _____ mo./day

D. Change in PLACE OF STORAGE

1.) Location of Proposed Place of Storage

_____ 1/4 _____ 1/4 _____ 1/4 Section _____, Township _____ N/S, Range _____ E/W, _____ County.

2.) Period of Storage: _____ mo./day to _____ mo./day

3.) Capacity of Proposed Storage Facility: _____ acre-feet

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5. **COMPLETION SCHEDULE:** Estimate how long it will take to complete the change after the Authorization is granted. 11-30-1989
months, years

(COMPLETE means the change is finished, developed, or constructed as authorized.)

What factors were considered in determining this time schedule?

What is the estimated cost of the proposed change?

6. **LOCATION MAP**

Attach a map and show the existing system and the changed system as proposed. A copy of an aerial photo or USGS map, which is available at the Water Rights Field Office may be used. Failure to supply an accurate map constitutes an incomplete application and the application will be returned. Show the following items.

- Township and range numbers
- Section corners and numbers
- Point(s) of diversion — past and proposed
- Location of conveyance ditch, pipelines, etc.
- Place(s) of use past and proposed (Irrigated acres, location of stock tanks)
- Place of storage — past and proposed

7. **FOR WATER RIGHTS EXEMPT FROM ADJUDICATION PROCEEDINGS:** Complete this section if you have checked Exempt Existing Water Right under part 2 on page 1. This information is to pertain to your existing right.

IMPORTANT NOTE

Water rights for stock and domestic uses from groundwater sources (wells, developed springs) in use prior to January 1, 1962 or any put to use between January 1, 1962 and July 1, 1973 which were properly filed with the county clerk and recorder under the 1961 Groundwater Code are considered Exempt Existing Water Rights. Instream domestic or stock uses used prior to July 1, 1973 are also considered exempt.

1. Date the water was first used: _____
(month, day, year)

2. Date of filing water right in the county courthouse records: _____
(month, day, year)

Document No. _____

3. Source of water: _____
(Name of stream or lake, well, spring, etc.)

Purpose of Use	Rate (GPM/CFS)	Volume (acre-feet)	Period of Use
_____	_____	_____	_____
_____	_____	_____	_____

5. **Point of Diversion:** (describe the location where the water has been diverted)

____ 1/4 ____ 1/4 ____ 1/4, Sec ____ Twp ____ N S, Rge ____ E W, Co ____

Lot ____ Blk ____ Subdivision (if any): _____

Means of Diversion: (how the water has been diverted or withdrawn from the source)

6. **Place of Use:** (describe the location where the water has been used)

Use: _____

Lot ____ Blk ____ 1/4 ____ 1/4 ____ 1/4, Sec ____ Twp ____ N S, Rge ____ E W, Co ____

Use: _____

Lot ____ Blk ____ 1/4 ____ 1/4 ____ 1/4, Sec ____ Twp ____ N S, Rge ____ E W, Co ____

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8. REMARKS

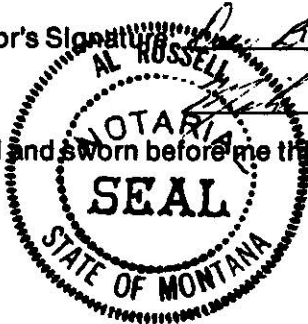
Use this space for further describing the past use of your Water Right or for providing any information which will help explain how you propose to change your water right.

9. SIGNATURES:

The Applicant hereby affirms that the statements appearing herein and on the attached supplements are to the best of his/her knowledge true and correct.

Appropriator's Signature Al Russell Date: 12-10-87

Subscribed and sworn before me this 10 day of DEC., 19 87



Notary for the State of MONTANA
Residing at Big Fork
My commission expires 1-28-89

FEE SCHEDULE

FOR APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT

FLAT RATE FEE OF \$50.00 unless The change proposed is a replacement well or reservoir
In the same source the FEE REQUIRED IS \$10.00.

Montana Water Rights Bureau Area Field Offices

HAVRE 1708 W. 2nd St., P.O. Box 1828
Havre, Montana 59501 Phone: 265-5516 or 265-2226
Serving: Blaine, Chouteau, Glacier, Hill, Liberty, Pondera,
Teton and Toole counties.

MISSOULA Holiday Village, Professional Plaza,
Suite 105, P.O. Box 5004
Missoula, Montana 59806 Phone: 721-4284
Serving: Missoula, Granite, Ravalli, and Mineral counties

GLASGOW 110 5th St. So., Rm. 108, P.O. Box 894
Glasgow, Montana 59230 Phone: 228-2561
Serving: Daniels, Dawson, Garfield, McCone, Phillips,
Richland, Roosevelt, Sheridan and Valley counties.

HELENA 1520 E. 6th Ave., Helena, Montana 59620
Phone: 444-8695 Serving: Deer Lodge, Powell, Lewis &
Clark, Broadwater, Silver Bow, Jefferson and Beaverhead
counties.

BOZEMAN 1201 E. Main, Bozeman, Montana 59715
Phone: 586-3136 Serving: Gallatin, Park and Madison
counties.

BILLINGS 1537 Ave. D, Suite 105
Billings, Montana 59102 Phone: 657-2105
Serving: Big Horn, Carbon, Stillwater, Treasure, Yellowstone
and Sweet Grass counties.

KALISPELL 3220 Hwy. 93 So., P.O. Box 860
Kalispell, Montana 59903 Phone: 752-2288
Serving: Flathead, Lake, Lincoln and Sanders counties.

LEWISTOWN 613 NE Main St., P.O. Box 438
Lewistown, Montana 59457 Phone: 538-7459
Serving: Cascade, Fergus, Golden Valley, Judith Basin,
Meagher, Musselshell, Petroleum and Wheatland counties.

MILES CITY 5 North Prairie, P.O. Box 276
Miles City, Montana 59301 Phone: 232-6359
Serving: Carter, Custer, Fallon, Powder River, Prairie,
Rosebud and Wibaux counties.

CASE # 129039

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	FINAL ORDER
RIGHT NO. G-129039-76D BY DEAN B.)	
KEIM AND MIKE B. KRUEGER)	

* * * * *

On April 13, 1989, the Department Hearing Examiner issued Proposal for Decision in this matter. The proposal recommended that the Application to Change Appropriation Water Right No. G-129039-76D by Dean B. Keim and Mike B. Krueger be granted to change the point of diversion from the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15 to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, Township 37 North, Range 28 West, and the place of use from the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, and the E $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15 to twelve acres in the E $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, two acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, and one acre in the S $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, all in Township 37 North, Range 28 West, Lincoln County, Montana.

Exceptions to the Proposal were received by the Department on May 11, 1989 from Objectors John A. Miller, Larry Beardsley, and Judith Watson. The Hearing Examiner ruled in the Proposal that Judith Watson was an untimely objector. A motion dated June 23, 1989, by Lawrence H. Sverdrup, attorney for John A. Miller and Kathryn Miller, was made to have the Department certify the question of ownership of the subject water right to the Water Court. On July 31, 1989 the motion was withdrawn.

In the exception, the Objector John A. Miller claims three-

CASE # 129039

fourths of the Water Right in question and that the issue was then before the District Court of the 19th Judicial District, Lincoln County, Montana, in Civil Cause No. DV-89-24. He asserts that Conclusion of Law No. 5, "that the water rights of other persons will not be adversely affected by the proposed changes in place of use and point of diversion", is in error and any change in right claimed by John A. Miller would necessarily adversely affect him. The Department agrees with the Hearing Examiner, the change authorization proceeding is not the proper forum for deciding the ownership and contractual disagreement for the subject water right. The record shows that John A. Miller filed Statement of Claim for Existing Irrigation Water Right No. 129039-s76D in the adjudication process in 1982. In 1987, the Department received a Water Right Transfer Certificate, which purports to reflect the transfer of 100% of the Claim No. 129039-s76D from John A. Miller to the Applicants. Where the evidence in the record indicating that Applicant owns the water right to be changed, Applicant has met its threshold requirement and the Department may act on the request, even if no final determination has been rendered by a court of competent jurisdiction. See, Fagen, Change No. 65713-76N, Final Order Issued April 27, 1989.

Exception was also taken with Proposed Conclusion of Law No. 5 and No. 7 relating to the proposed use of the ditch right belonging to Objectors. The Objector argues that the applicants must prove by substantial credible evidence that "the proposed means of diversion, construction, and operation of the

appropriation works are adequate" and since the Objectors own the ditch rights the Applicant has failed in his proof.

The issuance of a Change is merely a recognition of the physical adequacy of the appropriation works which the Applicant proposes to utilize and any legal right to use the ditch must be acquired separately. See, Application for Change of Appropriation W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc, Final Order issued March 22, 1989, p. 5. and Application for Change of Appropriation No. 150741-41H by William Tietz, Final Order issued December 18, 1989, p. 6. Therefore Proposed Conclusion of Law No. 5 and 7 are accepted as proposed.

All Proposed Findings and Conclusions of the Hearing Examiner are hereby adopted and incorporated in this Order by reference.

Based upon the Findings and Conclusions, all files and records herein, and the exceptions, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, authorization is hereby granted to Dean B. Keim and Mike B. Krueger to change the point of diversion for Water Right No. 129039-s76D from the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15 to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, Township 37 North, Range 28 West. Appropriators Keim and Krueger are also hereby authorized to change the place of use from the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, and the E $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15 to twelve acres in

the E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, two acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, and one acre in the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, all legals in Township 37 North, Range 28 West, Lincoln County, Montana. The period of appropriation shall be May 1 through October 31, inclusive of each year.

The Change Authorization in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Change Authorization is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Appropriator to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Appropriator's liability for damages caused by exercise of this Authorization, nor does the Department, in issuing this Authorization, acknowledge any liability for damages caused by exercise of this Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

C. In the event that a court of competent jurisdiction determines that the Appropriators do not present change, the Change Authorization in this matter will be amended to reflect the court determination. Appropriators Keim and Krueger must notify the Department of any court determination within 30 days of its issuance, and must provide the Department with a written copy of the determination. The Appropriators will not be

entitled to divert water pursuant to this authorization in excess of their determined water rights.

D. The Appropriators shall be responsible for the initial cleaning of the diversion ditch they propose to utilize, prior to using the ditch for their diversion purposes. If necessary to prevent the ditch from overflowing, the Applicants shall also raise the ditch sides. The Applicants also will be responsible for their pro rata share of future ditch maintenance.

E. The Appropriators shall enlarge and/or deepen the diversion point, or shall construct such dike or abutment as may be authorized by the relevant laws of Montana, to the extent necessary to make the diversion ditch a feasible means of diversion during periods of low flow in the source creek.

F. The Appropriators shall install, on the pipeline leading into their pond, an orifice or restricted pipe section which has been designed by a competent engineer to limit the flow so diverted to the maximum rate granted to the Appropriators under this right. The diversion line shall also contain a valve or other mechanism so that flows into the pond may be controlled separately from the diversions being made for other purposes through the main pipeline.

G. The Appropriators shall utilize the on-line measuring device now installed in their main pipeline to measure all waters being diverted. Separate written records of the times and amounts of diversion made pursuant to the Change Authorization in this matter shall be kept, and shall be made available to the

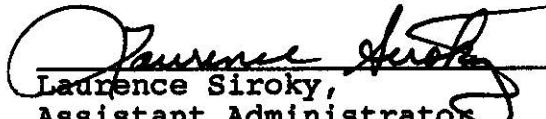
Department upon request.

H. Issuance of this Change Authorization by the Department in no way grants the Appropriators any easement rights, or the right to enter upon the property of other persons or entities to exercise this Change Authorization.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 27 day of June, 1990.


Laurence Siroky,
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 28 day of June, 1990, as follows:

Dean B. Keim and
Mike B. Krueger
4155 West Kootenai Road
Rexford, MT 59930

Lawrence H. Sverdrup
503 California Ave.
Libby, MT 59923

Charles Sprinkle
Douglas and Sprinkle
PO Box 795
Libby, MT 59923

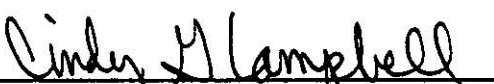
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251 Whitetail Drive
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Chuck Brasen, Field Manager
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PO Box 860
Kalispell, MT 59903


Cindy G. Campbell
Hearings Unit Secretary

66

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *


IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER)
RIGHT NO. G-129039-76D BY DEAN B.)
KEIM AND MIKE B. KRUEGER)

ORDER RESCINDING
FINAL ORDER

* * * * *

PLEASE BE ADVISED that Exceptions to the Hearing Examiner's Proposal for Decision dated April 13, 1989, have been received in the above matter. Due to an error in the routing of department mail, the Exceptions were not received by the appropriate Hearing Examiner before the issuance of the Final Order. Since the Exceptions were timely mailed, the Final Order dated May 8, 1989 is hereby rescinded.

Dated this 16 day of May, 1989.


Laurence Siroky, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Order Rescinding Final Order was duly served upon all parties of record at their address or addresses this 16th day of May, 1989, as follows:

Dean B. Keim and
Mike B. Krueger
4155 West Kootenai Road
Rexford, Montana 59930

Charles Sprinkle
Douglas and Sprinkle
P.O. Box 795
Libby, Montana 59923

CASE # 129039

Douglas F. and Stella Truman
2655 West Kootenai
Rexford, Montana 59930

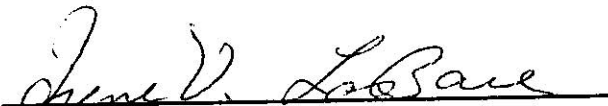
Lawrence H. Sverdrup
503 California Ave.
Libby, Montana 59923

Chuck Brasen, Field Manager
Kalispell Field Office
P.O. Box 860
Kalispell, Montana 59903

Larry Beardsley
3500 W. Kootenai Rd.
Rexford, MT 59930

Judith Watson
440 West Kootenai Rd.
Rexford, MT 59930

John A. Miller
251 Whitetail Drive
Rexford, MT 59930


Irene V. LaBare
Legal Secretary

BB

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	FINAL ORDER
RIGHT NO. G-129039-76D BY DEAN B.)	
KEIM AND MIKE B. KRUEGER)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received.

Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the April 13, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based on the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, authorization is hereby granted to Dean B. Keim and Mike B. Krueger to change the point of diversion for Water Right No. 129039-s76D from the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15 to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, Township 37 North, Range 28 West. Appropriators Keim and Krueger are also hereby authorized to change the place of use from the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, and the E $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15 to twelve acres in the E $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, two acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section

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14, and one acre in the S¹/₄NW¹/₄NW¹/₄ of Section 14, all legals in Township 37 North, Range 28 West, Lincoln County, Montana. The period of appropriation shall be May 1 through October 31, inclusive of each year.

The Change Authorization in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Change Authorization is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Appropriator to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Appropriator's liability for damages caused by exercise of this Authorization, nor does the Department, in issuing this Authorization, acknowledge any liability for damages caused by exercise of this Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

C. In the event that a court of competent jurisdiction determines that the Appropriators do not possess the entire water right which is the subject of the present change, the Change Authorization in this matter will be amended to reflect the court determination. Appropriators Keim and Krueger must notify the Department of any court determination within 30 days of its issuance, and must provide the Department with a written copy of the determination. The Appropriators will not be entitled to

divert water pursuant to this authorization in excess of their determined water rights.

D. The Appropriators shall be responsible for the initial cleaning of the diversion ditch they propose to utilize, prior to using the ditch for their diversion purposes. If necessary to prevent the ditch from overflowing, the Applicants shall also raise the ditch sides. The Applicants also will be responsible for their pro rata share of future ditch maintenance.

E. The Appropriators shall enlarge and/or deepen the diversion point, or shall construct such dike or abutment as may be authorized by the relevant laws of Montana, to the extent necessary to make the diversion ditch a feasible means of diversion during periods of low flow in the source creek.

F. The Appropriators shall install, on the pipeline leading into their pond, an orifice or restricted pipe section which has been designed by a competent engineer to limit the flow so diverted to the maximum rate granted to the Appropriators by court determination. The diversion line shall also contain a valve or other mechanism so that flows into the pond may be controlled separately from the diversions being made for other purposes through the main pipeline.

G. The Appropriators shall utilize the on-line measuring device now installed in their main pipeline to measure all waters being diverted. Separate written records of the times and amounts of diversion made pursuant to the Change Authorization in


this matter shall be kept, and shall be made available to the Department upon request.

H. Issuance of this Change Authorization by the Department in no way grants the Appropriators any easement rights, or the right to enter upon the property of other persons or entities to exercise this Change Authorization.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 8 day of May, 1989.


Gary Fritz, Administrator
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 8th day of May, 1989, as follows:

Dean B. Keim and
Mike B. Krueger
4155 West Kootenai Road
Rexford, Montana 59930

Charles Sprinkle
Douglas and Sprinkle
P.O. Box 795
Libby, Montana 59923

Douglas F. and Stella Truman
2655 West Kootenai
Rexford, Montana 59930

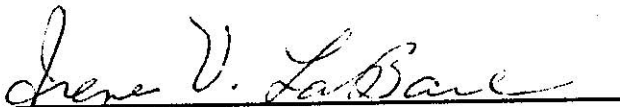
Lawrence H. Sverdrup
503 California Ave.
Libby, Montana 59923

Chuck Brasen, Field Manager
Kalispell Field Office
P.O. Box 860
Kalispell, Montana 59903

Larry Beardsley
3500 W. Kootenai Rd.
Rexford, MT 59930

Judith Watson
440 West Kootenai Rd.
Rexford, MT 59930

John A. Miller
251 Whitetail Drive
Rexford, MT 59930


Irene V. LaBare
Legal Secretary

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	PROPOSAL FOR
RIGHT NO. G-129039-76D BY DEAN B.)	DECISION
KEIM AND MIKE B. KRUEGER)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a contested case hearing in the above-entitled matter was held on February 27, 1989 in Eureka, Montana.

Applicants Dean Keim and Mike Krueger appeared at the hearing by and through Mike Krueger and counsel Charles Sprinkle.

Jay Billmeyer, consulting engineer, appeared as a witness for the Applicants.

Elaine Krueger appeared as a witness for the Applicants.

Objector Douglas Truman appeared at the hearing in person. Objector Stella Truman attended the hearing, but appeared by and through her son, Donavan Truman.

John Miller appeared at the hearing as an Objector, in person and by and through counsel Lawrence Sverdrup. (See Preliminary Matters.)

Larry Beardsley appeared at the hearing as an Objector and as a witness for Objectors Truman. (See Preliminary Matters.)

Judith Watson appeared at the hearing as an untimely Objector.

CASE # 129039

A review of Department records indicates that, with the addition of Mr. Beardsley and Mr. Miller, a complete notice of hearing has been made. Since Mr. Miller and Mr. Beardsley did appear at the hearing in the absence of individual notice, were allowed to present their objections and testimony, and did not allege that lack of notice made it impossible for them to properly present their case, the Hearing Examiner finds that deeming these individuals timely Objectors and thereby granting them the privileges of parties to this matter (See ARM 36.12.318 and 36.12.219) cures deficiencies in individual notice.

B. Dispute over ownership

John Miller filed Statement of Claim for Existing Irrigation Water Rights No. 129039-s76D in the adjudication process in 1982. In 1987, the Department received a Water Right Transfer Certificate, which purports to reflect the transfer of 100% of Claim No. 129039-s76D from John Miller to the Applicants. On the basis of this transfer, the Applicants are applying to change the point of diversion and place of use of the entire claim. However, John Miller now alleges that his intent was not to transfer the entire claim, but only that portion of it which was appurtenant to the land which he sold to the Applicants; in other words, water rights for five acres rather than for 20 acres.

Counsel for John Miller initially requested that the matter be certified to the Water Court. However, after a discussion held off the record at the hearing in this matter, counsel for

Mr. Miller and counsel for the Applicants agreed that the issue of ownership would be pursued in the district court action filed by Mr. Miller. The Hearing Examiner agrees that this is the proper forum: the Department does not have the authority to make final determinations on pre-1973 water rights. Rather, the matter is a contractual disagreement between the parties, to be decided in court. However, since the existence and extent of the underlying claimed water use right is not in dispute, it does not appear that the Water Court is the proper forum.

All of the documents in the Department record indicate that the Applicants own the water right for which the change application has been made. Although Mr. Miller disputes that the entire water right was transferred, his testimony indicates that he agrees some portion of Claim No. 129039-s76D was transferred to the Applicants. Therefore, the Department has sufficient proof of ownership in the Applicants to proceed with its decision on the Change Application. Any change authorization which may be granted will be contingent on a determination in the proper forum that the Applicants have a possessory interest in the water right, and will be conditioned to limit the Applicants' proposed use to the portion of the right which they are found to possess.

EXHIBITS

The Applicants offered five exhibits for inclusion in the record in this matter:

Applicants' Exhibit 1 is a photocopy of a Notice of Appropriation of Water Right filed on July 28, 1937 by James W. Butts. (One page.)

Applicants' Exhibit 2 is a photocopy of a Notice of Appropriation filed on December 31, 1963 by John and Helen Doble for a water use right dating from November, 1938. (One page.)

Applicants' Exhibit 3 is a photocopy of a security agreement between John Miller and the Applicants, with two attachments. (Three pages.)

Applicants' Exhibit 4 is a photocopy of a drawing of the layout for the Applicants' proposed diversion and impoundment. (One page.)

Applicants' Exhibit 7 is a lab report showing soil test data for a soil sample from the Applicants' property. (One page.)

Applicants' Exhibits 1, 2, 4, and 7 were accepted for the record without objection. Objection to Applicants' Exhibit 3 was overruled and the exhibit admitted. However, upon review of the document, the Hearing Examiner finds the document to be irrelevant to the issues before the Department, and therefore will assign no weight to this exhibit. No Exhibit 5 or 6 was offered for inclusion in the record.

The Objectors offered two exhibits for inclusion in the record:

Objectors' Exhibit 1 is a photocopy of the Complaint filed in District Court by John Miller (Cause No. DV-89-24, 19th Judicial District, Lincoln County). (Three pages, with four

attachments.) The exhibit was admitted for the limited purpose of showing that a dispute exists as to the ownership of the underlying water right in this matter.

Objectors' Exhibit 2 is a photocopy of a water analysis of a water sample taken from Young Creek by Objector Douglas Truman. (One page.) Objectors' Exhibit 2 was accepted for the record without objection.

The Department offered one exhibit for inclusion in the record:

Department Exhibit 1 is a panoramic picture of the Applicants' pond, composed of eight photographs taken by Charles Brasen on August 30, 1988. This exhibit was offered at the hearing on the Applicants' application for a new use permit which immediately followed the hearing in this matter, and which was attended by the same parties (with the exception of Mr. Miller). The parties agreed that the Hearing Examiner could use this exhibit for reference purposes in reviewing both applications.

The Department file was made available at the hearing for review by all parties. No party objected to the admission of any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Section 85-2-402(1), MCA, states, in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature". Since the present change application does not involve the quantity of water necessary to trigger legislative review, the Department has jurisdiction over this Application for Change.

2. Application for Change of Appropriation Water Right No. G129039-76D was duly filed with the Department of Natural Resources and Conservation on December 10, 1987 at 11:30 a.m.

3. The pertinent portions of the Application were published in the Tobacco Valley News, a newspaper of general circulation in the area of the source, on February 10, 1988.

4. The Applicants propose to change the point of diversion, means of diversion, and place of use of Appropriation Water Right No. G129039-76D, the source for which is surface water from Young Creek, a tributary of the Kootenai River.

5. Statement of Claim of Existing Irrigation Water Rights No. G129039-76D claims 160 gallons per minute ("gpm") up to 50 acre-feet of water per year for irrigation use on five acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, twelve acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, and three acres in the E $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, all legals in Township 37 North, Range 28 West, Lincoln County, Montana. The claim reflects that the water was diverted by means of a pump and pipeline at a location in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, Township

37 North, Range 28 West, from May 1 through October 31 of each year.

The Applicants propose to move the point of diversion downstream on Young Creek, to a location in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, Township 37 North, Range 28 West, at which point it would be diverted by means of a headgate and ditch. The Applicants propose to continue irrigating the five acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14 to which the claimed right already is appurtenant, while changing the place of use for the balance of the right to twelve acres in the E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, two acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, and one acre in the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, all legals in Township 37 North, Range 28 West, Lincoln County, Montana. (Department file; testimony of Mike Krueger.)

6. The Applicants propose to divert the water from Young Creek through an existing diversion ditch which runs for approximately 535 feet (Applicants' Exhibit 4). At the end of the ditch, the water is diverted through two existing pipelines. The flow is controlled by a headgate structure. One of the pipelines (marked "D" on Applicants' Exhibit 4) serves the Applicants exclusively, while the other pipeline provides water to Objectors Miller and Beardsley, and to Mrs. Watson. The Applicants already utilize their pipeline to divert water pursuant to other water rights. (Testimony of Mike Krueger.)

The Applicants have excavated a pond which runs parallel to their pipeline, with the impoundment structure placed at a right

angle to the pipeline at the point where the diversion ditch from Young Creek feeds into the pipelines. (See Applicants' Exhibit 4.) The pond is 540 feet long, with a width of 110 feet at the impoundment narrowing to 85 feet at the upper end of the pond. The pond has a storage capacity of approximately 4.5 acre-feet, with a surface area of approximately one acre. (Testimony of Jay Billmayer.)

The Applicants propose to run the additional (changed) 160 gpm through their pipeline to fill this pond, then pump out of the pond for sprinkler irrigation of the proposed place of use. The existing pipeline is large enough to handle the added flow. (Testimony of Krueger, Billmayer.) Applicant Mike Krueger testified that he plans to divert water from the pond at a rate not exceeding the 160 gpm flow entering the pond. Water would be pumped out into a sprinkler system, with the flow being controlled by the size and number of sprinkler heads. The sprinkler system would be used to irrigate the proposed place of use for pasture and possibly a hay crop. (Testimony of Krueger.)

7. Testimony indicates that the diversion ditch from Young Creek is of sufficient size to carry the additional flow of 160 gpm if it is cleaned and maintained. (Testimony of Krueger, Billmayer, Kauffman.) The Objectors testified that the ditch used to "overtop" on occasion, especially in the area at the end of the ditch. (Testimony of Truman, Kauffman.) However, the Applicants have done earthwork to raise the elevation of the top of the ditch, especially in the area of the ditch end, and have

installed a berm to brace the area of the ditch that used to wash out. (Testimony of Krueger, Billmayer.) Applicants' witness Jay Billmayer testified that measures can be taken to ensure that the water does not overrun the ditch, either by setting the top of the ditch sides at or above the level of the creek bank, or by installing an overflow weir.

In addition to ensuring that the water does not overflow the ditch, the use of water through the pipelines requires that the water be kept deep enough in the ditch to provide head for the water entering the pipes. This requires that the water level at the end of the ditch be maintained at a depth of at least two feet above the top of the pipe inlets. (Testimony of Kauffman.) The addition of 160 gpm to the flow of the ditch should be useful in providing that much more "carriage water" and water depth. (Testimony of Krueger, Billmayer.)

However, it is possible that not all of the parties' water will make it into the diversion ditch from Young Creek during low flow regimens as the diversion is presently constructed: as the ditch presently is constructed, portions of the ditch are higher than the diversion point, and the diversion point is not low enough at the stream to divert the full amount of water, without rocks being laid in the creek to help divert flow into the ditch. (Testimony of Kauffman, Billmayer, Beardsley.) The Objectors testified that they had attempted to resolve the problem by installing a concrete "abutment", but that the installation did not resolve the problem. Objectors' witness Steve Kauffman

testified that many times in the past the water did not enter the diversion ditch from Young Creek fast enough to supply adequate head for the necessary pressure.

Mr. Kauffman testified that one potential issue of concern is that the Applicants will not have any incentive to keep the water level above the pipe inlets built up, because a lower water level may be sufficient to transport water the short distance to the pond even when it is insufficient to provide pressure at the end of the pipeline system.

8. The Applicants intend to divert the water they receive pursuant to the water right in this matter through their pipeline, and then through a "T" into a line running into the pond. Mr. Krueger testified that originally he had planned to add an additional pipeline which would run water only into the pond, but that his engineer (Billmayer) had suggested that it would be more feasible to take the water through the Applicants' existing pipeline.

Applicant Krueger testified that he can control the flow between the pipeline and the pond by limiting the size of the outlet pipe leading off the main pipeline to the size needed to convey only the flow being diverted to the pond. He also expressed his willingness to install an in-line flow meter and/or an adjustable valve on the diversion pipe into the pond, and to maintain records, in addition to the flow meter and recordkeeping he maintains on the main pipeline.

Jay Billmayer testified that, in preference to a valve system for flow regulation, flow can be limited by installing an orifice or calibrated pipe section on the diversion line. He stated that the takeoff point for the pipe leading to the pond would be close enough to the main pipeline entrance that the water pressure should not vary much; therefore, the pressure can be measured and a pipe section or a plate with a certain diameter hole in it (orifice) can be installed, calibrated to limit the flow of water going to the pond to the allowable amount.

9. Applicant Mike Krueger testified that the pond excavation was "sealed" with "clay" material, which had been approved by a Soil Conservation Service agent prior to beginning construction. Jay Billmayer testified that he did not observe anything in the pond he would describe as "clay", but that the soils are very tight soils "more on the order of silt loams or silt" and are tight enough to provide adequate resistance to seepage, especially for the small volume of water involved.

Mr. Krueger testified that two small spring areas had been uncovered during excavation, but that they had been covered back up and sealed. He stated that it is not his intention to develop the springs and use them as part of the water source. The testimony of Mr. Krueger and Jay Billmayer, and Department Exhibit 1 indicate that water from the springs is not feeding into the pond.

The Applicants also intend to install a drain tube in the impoundment, which would run through the embankment and lead into an old water channel which goes back to Young Creek (a distance of approximately 130 feet from the pond). (See Applicants' Exhibit 4.) Mike Krueger testified that the drainage tube will be set at a level where it will act as an emergency overflow for the pond, and will be large enough to handle the total amount of flow entering the pond.

10. In addition to expressing concerns regarding the adequacy of the diversion ditch, possible effects to the water pressure on the other pipeline if the Applicants take more water through their pipeline, and how the Applicants' diversion amount can be controlled, the Objectors expressed concern that the Applicants' proposed project might adversely affect the water quality of Young Creek.

Objector Douglas Truman and Donavan Truman introduced a water sample analysis of Young Creek water to show that the pH level in Young Creek is already high. (See Objectors' Exhibit 2.) They stated that they are concerned that the Applicants' proposed use of the pond will exacerbate the water quality problem, since water will be running through soils that have been disturbed by the earthwork done. They feel that the soil chemistry of the Applicants' property (see Applicants' Exhibit 7), together with the earthwork, may cause leaching which will result in heightened pH and saline levels in the creek. The Objectors also believe that the Applicants' pond lies in a highly

alkaline area, and that the "sumphole" (boggy area) which lies between the pond embankment and the creek is full of salt and alkaline which could be flushed into the creek if water pours over or through the embankment. (Testimony of Douglas Truman, Donavan Truman.)

11. Applicant Krueger testified that the proposed use of water in the pond should not cause adverse effect to the water quality of Young Creek. An analysis of soil from the pond area indicates that the soil is slightly lower in pH than Young Creek Water (8.0 compared to 8.1). (Compare Applicants' Exhibit 7; Objectors' Exhibit 1.) Furthermore, under most circumstances, water from the pond should not be returning to Young Creek, since the water will be diverted when the Applicants intend to use it for sprinkler irrigation, at the same rate it will be being applied. (Testimony of Krueger.) Water will return to the creek from the pond only in the event that the pump stops or another contingency occurs which results in water leaving the pond through the overflow.

Applicants' witness Jay Billmayer testified that he has worked with a lot of saline soils, and that the setting of the ponding is not one which exhibits high alkalinity. He stated that, given the small size of the project and of the flow involved, especially compared to the overall Young Creek drainage basin, any effect on water quality would be too small to measure.

12. The Objectors also expressed their belief that the Applicants may not have the necessary easements in order to do

work along the diversion ditch and the pipelines. Mike Krueger testified that the easement lies on the Applicants' property, and that he believes, furthermore, that the easements are appurtenant to the Applicants' property. However, the Objectors stated that the easement was theirs, and they believe the Applicants must obtain approval from the owners. (Testimony of Truman, Watson, Beardsley.)

In response to questioning by Donavan Truman, other Objectors also expressed concern that the Applicants could assert the more senior priority date attached to the water right they are proposing to change, and thereby shut the other ditch users off in order to obtain whatever water was in the ditch. (Testimony of Beardsley.)

13. A review of Department records indicates that there are no planned uses or developments for which a permit has been issued or water reserved, in addition to the claimed and permitted uses already being utilized on Young Creek.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following;

PROPOSED CONCLUSIONS OF LAW

1. All relevant substantive and procedural requirements of law or rule having been fulfilled, and all requirements of notice having been adequately met (see Preliminary Matters), the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the Change Authorization herein, and all the parties hereto.

3. The Department must issue a Change Authorization if the Applicants prove by substantial credible evidence that the following criteria, set forth in § 85-2-402(2), are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

4. The proposed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. The Applicants have provided substantial credible evidence that the water rights of other persons will not be adversely affected by the proposed changes in place of use and point of diversion.

The Objectors have suggested that the proposed change in point of diversion will adversely affect their water rights by exceeding the ditch capacity, making it more difficult to maintain a pressure head for their pipeline, or by using additional waters from Young Creek (due to the Applicants' "doubling up" use of water with John Miller, see Preliminary Matters, or to lack of adequate flow control on the Applicants' diversion). However, the evidence in the record indicates that these objections have already been met, or can be met through the imposition of conditions on the change authorization.

The evidence indicates that the ditch has an adequate carrying capacity to handle the additional flow, especially if it is cleaned. See Finding of Fact 7. The dirtwork which the Applicants already have done appears to be sufficient to keep the ditch from overtopping. The Objectors should not be adversely affected by the flow of additional waters in the ditch; in fact, the additional water should work to provide added head for the Objectors' pipeline. See Finding of Fact 7. Since the diversion ditch is of adequate size to hold the water being diverted by all the users, the Objectors' concerns regarding the Applicants' senior priority date will be met, since it will not be a question of the users having to vie for a limited water flow. (The fact that the Applicants may be able to divert from the creek at times when less senior users may be shut off is a function of the priority system, not a result of the proposed change.) The change in diversion point also should not adversely affect water users downstream on Young Creek, since taking the same amount of water out of the stream at the Applicants' proposed point of diversion rather than the former point of diversion will not change the flow of water available downstream.

The Applicants have provided substantial credible evidence of how their diversion may be operated to physically limit the amount of their diversion. See Finding of Fact 8. In addition, the Objectors will be protected from the possible adverse effects of having the Applicants and John Miller both utilizing water

pursuant to the same water right by conditioning of any change authorization granted in this matter. (See Preliminary Matters.)

With regard to the Objectors' concerns about water quality, there is no evidence to suggest that the Applicants' proposed use of water will have any impact on the water quality of Young Creek. The Applicants intend to consumptively use the water diverted from Young Creek. However, even if all of the water which the Applicants diverted was returned to Young Creek, there would be no apparent measurable effect, given the small amount of water involved, the short time of contact, and the fact that pH and saline levels in the soil do not exceed those in the creek. See Finding of Fact 10.

6. There is substantial credible evidence that the proposed use will not adversely affect any future planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 13.

7. There is substantial credible evidence that the Applicants' proposed means of diversion, construction, and operation of the appropriation works can be made adequate. See § 85-2-402(7), MCA, which grants the Department the authority to impose any terms, conditions, restrictions, and limitations necessary to ensure that the statutory criteria of the change statute are met.

As discussed in Conclusion of Law 5 above, the evidence indicates that the capacity of the diversion ditch is adequate to carry the additional flow, and that the Applicants have ensured

that the ditch will not overtop or wash out. However, testimony also indicates that the ditch needs to be cleaned out so that its full capacity may be used, in order to handle the extra flow. See Finding of Fact 7. Therefore, the Applicants will be charged with the duty of sufficiently cleaning out the diversion ditch so that the ditch will be able to carry their diverted waters in addition to the waters presently diverted.

As the diversion into the ditch is presently constructed, not all of the Applicants' (or the Objectors') water may make it into the diversion ditch during periods of low flow in Young Creek. See Finding of Fact 7. Part of the problem may be alleviated if measures are taken when the Applicants clean the ditch, to remove any portions of the ditch bottom which are higher than the diversion point. However, the Applicants will also be required to enlarge or deepen the diversion point, or to install a dike or abutment (if allowed to do so by the applicable laws governing streambed preservation), to the extent necessary to maintain the adequacy of the diversion during times of low flow in Young Creek.

The Applicants have provided substantial credible evidence that their diversion may be constructed to limit the size of their diversion. Any Change Authorization which is granted in this matter will be conditioned to require the installation of one of the proposed flow restrictors (see Finding of Fact 8) and the measurement of the flow diverted.

7. The concerns expressed by the Objectors as to whether the Applicants have the necessary easements are property issues outside the scope of the Department's jurisdiction.

It appears likely that the Applicants already have easement rights (see Finding of Fact 12), or can obtain them. (See § 85-2-414, MCA.) However, it is not necessary or proper for the Department to make a determination on this issue. If the easements cannot be obtained, and as a result the proposed change cannot be accomplished, the change will not be perfected. See generally In the Matter of Application for Beneficial Water Use Permit No. 55390-s76H by Heather J. Grayson, January 24, 1986 Proposal for Decision (Final Order, March 7, 1986).

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, and upon all files and records in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, authorization is hereby granted to Dean B. Keim and Mike B. Krueger to change the point of diversion for Water Right No. 129039-s76D from the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15 to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, Township 37 North, Range 28 West. Appropriators Keim and Krueger are also hereby authorized to change the place of use from the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, and the E $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15 to twelve acres in the E $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, two acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section

14, and one acre in the S $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, all legals in Township 37 North, Range 28 West, Lincoln County, Montana. The period of appropriation shall be May 1 through October 31, inclusive of each year.

The Change Authorization in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Change Authorization is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Appropriator to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Appropriator's liability for damages caused by exercise of this Authorization, nor does the Department, in issuing this Authorization, acknowledge any liability for damages caused by exercise of this Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

C. In the event that a court of competent jurisdiction determines that the Appropriators do not possess the entire water right which is the subject of the present change, the Change Authorization in this matter will be amended to reflect the court determination. Appropriators Keim and Krueger must notify the Department of any court determination within 30 days of its issuance, and must provide the Department with a written copy of the determination. The Appropriators will not be entitled to

divert water pursuant to this authorization in excess of their determined water rights.

D. The Appropriators shall be responsible for the initial cleaning of the diversion ditch they propose to utilize, prior to using the ditch for their diversion purposes. If necessary to prevent the ditch from overflowing, the Applicants shall also raise the ditch sides. The Applicants also will be responsible for their pro rata share of future ditch maintenance.

E. The Appropriators shall enlarge and/or deepen the diversion point, or shall construct such dike or abutment as may be authorized by the relevant laws of Montana, to the extent necessary to make the diversion ditch a feasible means of diversion during periods of low flow in the source creek.

F. The Appropriators shall install, on the pipeline leading into their pond, an orifice or restricted pipe section which has been designed by a competent engineer to limit the flow so diverted to the maximum rate granted to the Appropriators by court determination. The diversion line shall also contain a valve or other mechanism so that flows into the pond may be controlled separately from the diversions being made for other purposes through the main pipeline.

G. The Appropriators shall utilize the on-line measuring device now installed in their main pipeline to measure all waters being diverted. Separate written records of the times and amounts of diversion made pursuant to the Change Authorization in

this matter shall be kept, and shall be made available to the Department upon request.

H. Issuance of this Change Authorization by the Department in no way grants the Appropriators any easement rights, or the right to enter upon the property of other persons or entities to exercise this Change Authorization.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument

must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 13th day of April, 1989.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision in the Matter of the Application for Change of Appropriation Water Right No. G-129039-76D by Dean B. Keim and Mike B. Krueger was duly served upon all parties of record at their address or addresses this 13th day of April, 1989, as follows:

Dean B. Keim and
Mike B. Krueger
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Rexford, Montana 59930

Charles Sprinkle
Douglas and Sprinkle
P.O. Box 795
Libby, Montana 59923

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Sally Martinez
Secretary